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Everyday Life and the Edges of Existence

Wrongs with No Name or the Wrong Name?

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> 'It is not logically possible for any person to be heard to say "I should not be here at all", because a non-being can say nothing at all.' (Harriton at [206] per Callinan J)

Actions for wrongful life, as they have come unfortunately to be styled encompass various types of claim. These include claims for alleged negligence after conception, and those based on negligent advice or diagnosis prior to conception concerning possible effects of treatment given to the child's mother, contraception or sterilisation, or genetic disability. This distinguishes such claims from those for so called wrongful birth, which are claims by parents for the cost of raising either a healthy child or one with a disability where the unplanned birth imposes costs on the parents as a result of clinical negligence.

Two of the more controversial cases to have reached the High Court in the past decade are Cattanach v Melchior where the Court, by a narrow majority (McHugh, Gummow, Kirby and Callinan JJ; Gleeson CJ, Hayne and Heydon dissenting) acknowledged recovery for wrongful birth,[1] and the joined appeals of Harriton v Stephens[2] and Waller v

James; Waller v Hoolahan,[3] where the Court overwhelmingly precluded a 'wrongful life' claim (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; Kirby J dissenting). Both cases raised issues around the sanctity and value of life, the nature of harm and the assessment of damages, and this brief note affords us the opportunity to consider the way in which the 'life as legal loss' arguments were treated by the various judges in both cases. Cattanach v Melchior is by now the more well known of the cases, and so may be briefly treated. Harriton and Waller both involve three questions. First, how is the loss in a 'wrongful life' case to be characterised? Is the 'loss' indeed properly regarded as 'life'? Second, once that loss has been characterised, does legal principle or public policy permit recovery? Third, if principle or policy permits recovery, is that loss capable of being ascertained. This is an additional ground to public policy generally relied upon to reject recovery. Of course, these three questions are not considered in isolation from each other – for example, the characterisation of the loss and the views on public policy are obviously interlinked.[4] In Harriton, Crennan J, giving the leading judgment, emphasises the need to preserve the coherence of legal principles[5] ironically using aspects of policy to do so.

Cattanach v Melchior

The Melchior's, deciding that they had completed their family with two children, agreed that Mrs Melchior should undergo a tubal ligation to be performed by Dr Cattanach. He understood her to have had her right fallopian tube removed during an appendectomy over twenty years previously. He clipped only her left tube. Four years later she gave birth to a third healthy child. Both Mrs and Mr Melchior (the basis of his claim was never really satisfactorily explored) successfully sued the doctor and the public

hospital in negligence for the failure to warn Mrs Melchior of the possibility of becoming pregnant again in the event that her right tube had not, in fact, been removed.

McHugh and Gummow JJ observed that the law should not shield the appellant doctor or hospital from 'what otherwise is a head of damages recoverable in negligence under general and unchallenged principles' for what was a breach of duty of care by Dr Cattanach.[6] They argued that what was wrongful was *not* the birth of the child but the negligence of Dr Cattanach.[7] Hence, as future expense was a reasonably foreseeable loss, albeit financial, it was recoverable.[8] A similar view was also taken by Justice Kirby.

Justice Hayne in dissent acknowledged that financial expenses associated with rearing a child were reasonably foreseeable, but rejected any notion that this automatically entitled parents to recover, arguing that it was against public policy to encourage parents to assert that their child represented a net burden.[9] Justice Heydon also appealed to public policy considerations; child-rearing costs should not be recoverable as this would transform children into objects and create a 'commodification' of life. Chief-Justice Gleeson appealed to international instruments protecting the rights of the child[10] to support this same conclusion while Justice Heydon believed such 'commodification' would be contrary to human dignity.[11]

In a phrase that was later to be reflected on in Harriton and Waller at greater length, responding to the appellant's argument that it was wrong to try to place a value on human life 'because it is invaluable – incapable of effective or useful valuation',[12] McHugh and Gummow replied that it would be wrong – simple but wrong – to call upon values such as the importance of respecting human life to conclude that that should shield the appellants from the full consequences in law of Dr Cattanach's

negligence.[13] Similarly, it was inappropriate to require set off of the benefits that the Melchior's could be expected to enjoy from the birth and development of the child, as the financial damage directly consequent upon damage to the physical interests of Mrs Melchior were an unrelated head of damage.

The Court had been urged to follow a distributive justice approach that requires a focus on the just distribution of burdens and losses among society, as held in the English House of Lords decision in McFarlane v Tayside Hospital Board.[14] There Lord Steyn had argued that 'tort law is a mosaic in which principles of corrective justice and distributive justice are interwoven and in situations of uncertainty and difficulty a choice has to be made between the two approaches.'[15] In Cattanach the High Court narrowly settled on the corrective justice approach, without recourse to subjective judicial notions of community conscience. As John Seymour has commented of these types of action and virtually predicted of Cattanach,

> 'To invoke a belief in the preciousness of human life in order to resist unwanted birth actions is, however, to adopt a perspective that is increasingly likely to be rejected.'[16]

A commitment to freedom of choice (for example in relation to termination of a pregnancy) is 'incompatible with the belief that the birth of a child is *invariably* a blessing.'[17] This much was, unusually, recognised in the first instance decision by Peter Pain J in the earlier English case of Thake v Maurice;[18] a social policy framework that admits of abortion and sterilisation rests upon the recognition that the birth of a healthy child is not always a blessing.

Harriton and Waller

In one of the leading statements of the common law approach to the claim for 'wrongful life' Stephenson LJ averred in McKay v Essex Area Health Authority that 'to impose such a duty towards the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy.'[19] It is worthwhile to recall that that case was decided before the English common law began to take its first tentative steps, now brokered into a brisk walk, away from a comprehensive statement of aspiration to the sanctity of life doctrine, holding, as now, that it is subject to the fundamental principle of autonomy and also, perhaps, to human dignity.[20] As we will later explain, that aspiration has always been one more of rhetoric than reality, but the framing of the debates are significant and important.

Alexis Harriton was born 25 years ago with severe physical and intellectual disabilities; she is blind, deaf, has mental retardation and physical disability. She is unable to care for herself and will require continuous care for the rest of her life. She argued that all this could have been avoided or averted if her mother, who had rubella during the first trimester of pregnancy, had been properly advised, which it was accepted that she was not, thus allowing her lawfully to terminate the pregnancy. The doctor's failure to order a second blood test on the appellant's mother led him wrongly to advise that the illness with which she had been suffering had not been rubella. Her claim before Studdert J in the New South Wales Supreme Court was dismissed and an appeal in that jurisdiction was similarly unsuccessful by a 2-1 majority.

Keeden Waller was born following his parents use of IVF. Mr Waller had a low sperm count and poor motility; examination disclosed that he also suffered from a blood disorder known as anti-thrombin or Factor III deficiency, the effect of which is to raise the likelihood that blood will clot in the arteries and veins. It was agreed that had the Waller's been told – which they were not – that the AT3 deficiency was genetic they would have either deferred undergoing insemination until methods were available to ensure only unaffected embryos were transferred, or used donor sperm or terminated an affected pregnancy, such as K's. Soon after birth K was diagnosed as suffering from a cerebral thrombosis as a result of which he suffers permanent brain damage, cerebral palsy and uncontrolled seizures. He sued the IVF practitioner, the diagnostic service that analysed K's father's sperm and a specialist obstetrician to whom K's mother was referred after embryo transfer for antenatal care arguing in each case that but for the negligence of the defendants he would not have been born suffering with disability.

Justice Studdert of the Supreme Court of NSW found against K on grounds encompassing duty, causation, quantifiability of damages and public policy. Specifically under the latter head the judge held that such an action would offend the principle of the sanctity of life; degrade disabled members of society; logically give rise to an action by the child against his or her mother for failure to terminate an affected pregnancy and would place an 'intolerable' pressure on medical indemnity insurance premiums.[21]

An appeal to the NSW Court of Appeal was dismissed by a 2 – 1 majority and a further appeal joined with Alexis Harriton's appeal to the High Court, was dismissed in both cases by a majority verdict 6-1. Justice Crennan, in Harriton and Waller, wrote the leading judgment; Kirby J was the sole dissentient in both appeals.

Crennan J (with whom Gleeson CJ, Gummow and Heydon J agreed in both cases) advised that the two main issues in H's appeal were whether there was legally cognizable damage and secondly, whether there was a relevant duty of care. Even if both these questions were answered affirmatively, she would have apparently denied the suit 'if calculating damages according to the compensatory principles was virtually impossible ...'[22]

On Duty

Crennan J observes that a doctor has a duty to advise a mother of problems arising in her pregnancy and that a doctor has a duty of care to a foetus which may be mediated through the mother. However, those duties are not determinative of the specific question here, she said, namely; whether the particular damage claimed in this case by the child engages a duty of care.

> To superimpose a further duty of care on a doctor to a foetus (when born) to advise the mother so that she can terminate a pregnancy in the interest of the foetus in not being born, which may or may not be compatible with the same doctor's duty of care to the mother in respect of her interests, has the capacity to introduce conflict, even incoherence into the body of relevant legal principle.[23]

Kirby J in contrast contends, that what is involved here is an 'unremarkable' case of a medical practitioner's duty to observe proper standards of care when the plaintiff was clearly within his contemplation as a fetus, in utero of a patient seeking his advice and care.[24] He cautions against the use of the 'emotive slogan'[25] of 'wrongful life' and, as he sees it, the importation of 'contestable religious or moral postulates.'[26] The reality of the

'wrongful life' concept is such that a plaintiff both *exists* and *suffers*, due to the negligence of others.[27]

Crennan J continued;

> A further consideration is that there would be no logical distinction to be made between a duty of care upon a doctor as proposed, and a correlative duty of care upon a mother or parents who decline to have an abortion and choose to continue a pregnancy despite being informed of the risk of disability to the child.

Of course, the existence and content, the nature and scope of the first duty – not to be negligent – is fixed by law. The existence and content of the latter – if it makes sense to call it a duty in law – is to do, first, what the woman believes to be in her best interests, and, secondly and (possibly correlatively), her fetus. The nature and scope of this consideration, be it a duty or otherwise, is fixed by the woman, according to her conscience (which may or may not include moral reflection) bounded only by what is lawful in the circumstances of the case. Crennan suggests that there is no *logical* distinction between a duty of care imposed on a doctor and that on a woman, *or parents*. How it could make any sense to impose any such duty on a man in such circumstances when, as a number of Justices explain, the decision as to termination is the woman's *alone* is not explored.

But, there are reasons of logic let alone common sense why such a distinction might be properly made. The doctor is the woman's doctor (and not, note, the couple's doctor); she, the fetus's mother. The nature of the relationships are not co-extensive; the

relationship of a pregnant woman to *her* fetus is not the same as that of *her* doctor either to *her* or to *her* fetus.

This dichotomisation might introduce conflict only if the relevant issues are mis-identified. Crennan J observed that Dr Stephens would have discharged his duty by diagnosing the rubella and advising Mrs Harriton about her circumstances, enabling her to decide whether to terminate her pregnancy; 'he could not require or compel Mrs Harriton to have an abortion.'[28] This is used as a ground to *deny* liability, whereas it might equally have been seen to be a ground for *imposing* liability; it is after all not an onerous duty to require of a medical practitioner (or anyone else for that matter) that they simply do their job. As Mason P (in dissent) pointed out in the New South Wales Court of Appeal '[d]octors seldom cause their patients' illnesses. But they may be liable in negligence for the pain and cost of treating an illness that would have been prevented or cured by reasonable medical intervention.'[29]

The calumny involved in the majority's handling of this issue is underlined in the judgment of Kirby J who rehearses that

> 'it was also agreed [in the statement of facts] that, in 1980, a reasonable medical practitioner in the position of the respondent would have advised Mrs Harriton of the high risk that a foetus which had been exposed to the rubella virus would be born profoundly disabled.'

But no such knowledge would have needed to have been to be imputed to even an unreasonable doctor in 1980, or long before. The reason why Mrs Harriton consulted her doctors was that *she was already worried* that she might have been exposed to rubella

and *she knew* that if this had been so she might well be delivered of a severely affected baby. The only special knowledge that the doctors had, which Mrs Harriton and most other pregnant women of that time would most likely not have had, was of the diagnostic tests that were available that would have been able to rule in or out that likelihood. In other words, the doctors were being approached for their special knowledge of something that augmented the common knowledge of illness.

On Damage

What is the damage in a 'wrongful life' suit? According to Hayne J in Harriton, the relevant question, and problem, is that in order for the appellant's life to be viewed as an 'injury' or 'harm', 'it is logically necessary to compare her life with another person' [30] and not, as she had contended with not having been born at all. 'It is because the appellant cannot ever have had and could never have had a life free from the disabilities that she has that the particular and individual comparison required by the law's conception of "damage" cannot be made.'[31] Crennan J argues that this involves 'A comparison between a life with disabilities and non-existence', which for the purposes of proving actual damage and having a trier of fact apprehend the nature of the damage caused, is 'impossible.'[32]

> There is no present field of human learning or discourse, including philosophy and theology, which would allow a person experiential access to non-existence, whether it is called pre-existence or afterlife. There is no practical possibility of a court (or jury) ever apprehending or evaluating, or receiving proof of, the actual loss or damage as claimed by the appellant. It cannot be determined in what

> sense Alexia Harriton's life with disabilities represents a loss, deprivation or detriment compared with non-existence. [33]

But this is precisely the sort of task with which the courts are faced in other areas of the law's engagement with medicine and medical science, and which they negotiate in a now routinised way. Consider, for example, cases authorising the withdrawal of treatment from neonates and adults with severe disabilities, or from the terminally ill. And the authorisation of surgery to separate conjoined twins knowing that one of them will die. True, these are not cases involving the assessment of monetary compensation but they do entail 'a judicial comparison between existence and non-existence' not dissimilar to that enjoined here.[34]

This is allied to the apparent impossibility of assessing *any* damages in these cases, either general or special damages. Clearly, while there are more tractable issues in assessing general damages, they are hardly more complex than for other personal injury claims entailing heads for pain and suffering and loss of expectation of life. But, as for special damages, such as those associated with the care and maintenance of Alexis Harriton, it is unclear why as a matter of legal principle these should not be recoverable from an admittedly negligent tortfeasor's insurers.[35]

Crennan J suggests that the appellant's argument that her life with disabilities is actionable clash with arguments about the value (or sanctity) of human life and evoke 'repugnance.' [36] It is 'odious and repugnant' to devalue the life of a person with a disability by suggesting that such a person would have been better off not to have been born into a life with disabilities.[37] But this is to mischaracterise the debate.

> The plaintiff in a wrongful life action does not maintain that his or her existence is wrongful. Nor does the plaintiff contend that his or her life should be terminated. Rather, the "wrong" alleged is the negligence of the defendant that has directly resulted in the present suffering.[38]

This much seems to be at the heart of the acknowledgement by McHugh and Gummow in Cattanach that what was wrongful was *not* the birth of the child but the negligence of Dr Cattanach. As alternatively expressed in Waller:

> "wrongful life" actions do not literally involve the complaint that life *per se* is wrongful. As in everyday personal injury actions, the complaint rather is that particular suffering and loss caused by the tortfeasor is legally wrongful. [39]

To damage is not always to make worse in the law of tort, '… it can consist of not making things better when there was a duty to do so. … The fact that the doctor did not cause the rubella damage does not mean that he did not cause the plaintiff to suffer under the rubella damage.' [40] What is 'wrongful' is not the life but the life of foreseeable suffering in the event of breach of a duty of care. This is not a wrong with no name; it is a wrong with the wrong name.

The legal action is a limited exercise constructed only in order to attempt to recover damages to support the life that is now being lived, one which, as described, involves total dependence and continuing care, a life that includes suffering. This case is, evidently, as with many torts cases, about other and wider issues than the presenting issue; it is about who cares, literally and metaphorically, for Alexia Harriton. 'It is hard to see how an award of damages to a severely handicapped or suffering child would

'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society."[41] The hope expressed in the majority judgments is that that will be done by or provided for by the state, rather than the insurance company standing behind Dr Stephens. Yet daily, we read of the general reluctance of all publics to pay for state of the art treatment and care for those who really need it; in terms of health care dollars, we want more and more for less and less. In everyday life there are those who live – literally and metaphorically – on the edges of existence. In this world, the Alexia Harriton's of our societies are likely to be towards the back of a very long queue.

That is not, of course, the same as saying that they should be at the head of it. But the metaphysical arguments that the High Court constructs and then eschews from entering (life v non existence) are no more than a convenient screen deflecting away from the core issue; should an admittedly negligent insured doctor's insurers be asked to absorb the costs of the long term consequences of the negligence, or should that be left either to general taxation or the private and philanthropic interest of the appellant's family and friends?

In Waller Crennan J (with whom Gleeson CJ, Gummow and Heydon JJ again agreed) averred that the plaintiff alleged that the defendants caused or materially caused his life with disabilities, flowing from the implantation of the embryo 'which became him,' [42] by failing to investigate and advise his parents that the AT3 deficiency was liable to be transmitted to offspring. It was agreed that such advice would have enabled the parents to make *lawful* decisions about starting or continuing the pregnancy which would have resulted in K not being born. According to Crennan J the claims involved an assertion that it would have been better if he had not been born, 'irrespective of whether the

conduct about which he complains occurred prior to, or during, his mother's pregnancy with him.'[43] That this is not legally cognisable damage, was held in Harriton. Justice Hayne (concurring) said that there was no relevant damage and Callinan J added that Waller (like Harriton) 'cannot be heard as a matter of logic, to say that he "should never have been brought into existence", in which event he would not have been able to say anything at all.' [44]

Again Justice Kirby was straightforward in his explication of the relevant law;

> 'The established duty of care which health care providers owe to the unborn in respect of pre-natal injuries requires the exercise of reasonable care in investigating risks of disability that might afflict prospective children and warning those in relevant relationships with the provider of such risks.'[45]

K was 'unquestionably foreseeable' and vulnerable to the consequences of the defendant's negligence. The first and second respondent 'enjoyed special control' over the circumstances that occasioned the damage caused. And none of the public policy arguments 'furnishes a convincing reason for refusing to provide relief for which ordinary negligence doctrine would otherwise provide.'[46]

The strongest argument against recognising a duty or imposing liability if it were breached, Kirby acknowledged, is that comparing existence with non-existence is an impossible exercise because it would involve unknowables or immeasurables.[47] But as Kirby objects in both Harriton and Waller 'these cases demonstrate that this is not so.'[48]

Conclusion

From Cattanach and Harriton and Waller we learn that while birth is not always a blessing for those caring for the born, life is always a boon for the person living it, irrespective of the cost or burden of that life to or on others.

There is something in these cases – especially Waller and Harriton – that discloses something of the nature of modern medicine. Harriton and especially Waller – on its facts – fall clearly into that category of cases that one of us has previously called 'stigmata cases.'[49] Here, in applying what he calls the ordinary principles of the law of negligence to Waller, Kirby J comes closest to an appreciation that IVF and its associated genetic technologies is part of an industry – a very particular and special industry to be sure – that operates on commercial lines. And that industry is heavily backed by insurance and services for which consumers are willing to pay. For some, that might in itself be thought to be a cognisable moral objection to the practices of IVF and genetics; that increasingly it looks like the child is being treated in some way as a commodity (not just as a means to another's ends in the Kantian formulation – at least no more than any child may be when conceived). IVF may itself be a part – a large part – of the commodification of the child, but a child who is no less loved and valued by its parents when it is a member of their family. In other words the commodification or commercialisation of part of the process of conception does not deleteriously affect the child after its birth. In the same way in those 'wrongful life' cases, the reality of a case such as this is that the wrongful life action like that of wrongful birth 'are about money rather than love or family feelings.' [50]

And, the High Court has held, there is no ground for believing that upholding a claim for damages following the birth of a healthy but originally unwanted child is likely to do any

more to commodify that child as a matter of law rather than unwarranted social sentiment (or values) that the Court was not prepared to admit to the bar. Strange then, that it does precisely that in Harriton and Waller, relying on the emotional linguistic appeal of the notion of wrongful 'life' rather than as Kirby suggests the less negatively valued laden (but not value free) notion of 'wrongful suffering.' In the first case the damages are awarded for the unlooked for expense of damage flowing directly from the physical harm to the mother in the unwanted pregnancy and childbirth, a fact virtually indistinguishable from the real harm in Harriton.

Even if wrongful life were to be regarded as the correct issue at bar, it is not one which would necessarily present the courts with novel issues. Children in Australia sue their parents for tortious wrongs already,[51] so no novel departure would be being acknowledged in this sort of suit. Most common law jurisdictions *apart from Australia* have had to grapple with the concept of a life that is no longer wanted by ill or injured adults, albeit that it is filed away under the torts of trespass to the person, from where the lexicon of modern medical law is trying to assemble it into a coherent language. Those jurisdictions have responded that the unwanted (by the person themselves) or even occasionally unwarranted (as not being in the incompetent person's best interests) imposition of a life upon a person is actionable at the suit of that person or on their behalf.

The changing catalogue of the doctrine of sanctity of life in the library of the common law, holds now that it should be shelved below other valuable principles, notably autonomy and in some libraries, human dignity. This fundamental shift is a steady and growing if sometimes reluctant acceptance that life may be sometimes more of a burden than a benefit. Typically, this has arisen and been confronted in law at the endings of

life; this has found notable judicial expression in the past two decades in cases such as those involving the dying of patients in a persistent vegetative state, of the withholding or withdrawal of treatment from adults and neonates with severe disabilities and from the terminally ill, and of the judicial authorisation of operations when the known or sometimes intended result is that one person will die, as in the sanction of operations on conjoined twins. Each of these instances evidences a radical rethinking of the doctrine of the sanctity of life in modern law, [52] and is one of the most significant shifts in the common law for centuries, if not, arguably, ever.

Whatever its rhetoric, however, the common law has never in fact been umbilically joined to the sanctity of life doctrine. The tort law system itself is one of regulating risk; certain activities entail risks that may be outweighed by the benefits resulting from them to the community as a whole. 'It is no less plausible to assert that rather than treating life as sacrosanct, the courts are inexorably involved in a system which cheapens life by exposing some lives to threat for comparatively trivial rewards for other people.'[53] As Guido Calabresi has taught, the law of torts entails choices in everyday life.[54] Cases at the edges of existence demand more perhaps of judicial precision that others. They disclose some of the fundamental values at stake in a legal system. It is unsatisfactory, then, to approach these cases as an exercise in misreading based on mislabelling.

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[1] Legislative intervention in Qld, NSW and SA has reversed this decision; Civil Liability Act 2002 (NSW), ss 70, 71; Civil Liability Act 2003 (Qld), ss 49A, 49B; Civil Liability Act 1936 (SA), s 67.

[2] [2006] HCA 15.

[3] [2006] HCA 16.

[4] Stephen Todd, 'Wrongful Conception, Wrongful Birth and Wrongful Life' (2005) 27 Sydney Law Review 525, 532.

[5] Harriton at [243].

[6] (2003) 215 CLR 1 at [57].

[7] Ibid.

[8] Stephen Todd, 'Wrongful Conception, Wrongful Birth and Wrongful Life' (2005) 27 Sydney Law Review 525, 530.

[9] Ben Golder, 'From McFarlane to Melchior and beyond: Love, sex, money and commodification in the Anglo-Australian law of torts' (2004) TLJ LEXIS 9, [33].

[10] International Covenant on Civil and Political Rights 1966, arts 23 and 24. International Covenant on Economic, Social and Cultural Rights 1966, art 10. Convention on the Rights of the Child 1989, art 18.

[11] Cattanach v Melchior (2003) 215 CLR 1, [353], [356].

[12] Cattanach, per Heydon J at [353].

[13] Cattanach at [77].

[14] [2000] 2 AC 59.

[15] Ibid at 83.

[16] Childbirth and the Law, OUP 2000, at 77.

[17] Ibid, at 77; our emphasis

[18] [1986] QB 644.

[19] [1982] QB 1166 at 1180.

[20] See Burke v General Medical Council [2004] HC 0000, at first instance, reviewing the authorities, per Munby J.

[21] [2002] NSWSC 462.

[22] Harriton at [219].

[23] Harriton at [249 – 50].

[24] Harriton at [72].

[25] Harriton at [13].

[26] Ibid.

[27] Curlender v Bio-Science Laboratories 165 Cal Rptr 477 at 488 (1980) per Jefferson PJ (emphasis in original).

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[28] Harriton at [243].

[29] Harriton (2004) 59 NSWLR 694 at 714.

[30] Op. cit., at 170.

[31] Op. cit., at 172.

[32] Harriton at [252].

[33] Harriton at [252 – 53].

[34] Harriton at [95] (per Kirby J).

[35] These points are extensively argued in Harriton by Kirby at [81] et seq.

[36] Harriton at [258].

[37] Ibid.

[38] Harriton at [10] per Kirby J.

[39] Waller at [41].

[40] Robert Lee 'The Claim of Wrongful Life' in Robert Lee and Derek Morgan (eds), Birthrights: Law & Ethics at the Beginnings of Life, London, Routledge, 1989, 172 at 176 – 77.

[41] Turpin v Sortini 182 Cal Rptr 337 (1982) at 344 – 45 per Kaus J.

[42] Harriton at [80] per Crennan J.

[43] Harriton at [86].

[44] Waller at [64].

[45] Waller at [6].

[46] Waller at [41].

[47] Citing Crennan J in Harriton at [265].

[48] Waller at [40].

[49] 'Regulating Risk Society; Stigmata Cases, Scientific Citizenship & Biomedical Diplomacy' (2001) 23 Sydney Law Rev 297 – 318.

[50] Harriton at [131] Per Kirby J.

[51] Lynch v Lynch (1991) 25 NSWLR 411; Bowditch v McEwan [2003] 2 Qd R 615.

[52] For consideration, see Peter Singer, Rethinking Life and Death: The Collapse of Our Traditional Ethics, New York, St Martin's Press, 1995.

[53] Op. cit., at 187.

[54] 'The Law of Torts and the Evil Deity' in Ideas, Beliefs, Attitudes, Values and the Law at 1.